



Department of
Primary Industries

Fisheries Compliance Enforcement Policy and Procedure

Fair, safe, efficient and equitable application of fisheries
laws in NSW

Fisheries Compliance Unit

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Disclaimer The information contained in this publication is based on knowledge and understanding at the time of writing (2011). However, because of advances in knowledge, users are reminded of the need to ensure that information on which they rely is up to date and to check the currency of the information with the appropriate officer of Department of Primary Industries or the user's independent advisor.

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Fisheries Compliance Enforcement Policy

1. Summary

The Department of Primary Industries (DPI) has responsibility for administering fisheries laws governing the fisheries resources of NSW. The department's Fisheries Division provides these services through the Fisheries Compliance Unit.

The Fisheries Compliance Unit includes the Zone and District based compliance teams, the Statewide Operations and Investigations Group (SOIG) and the Conservation and Aquaculture Group (CAG).

This enforcement policy provides the guiding principles necessary for a fair, safe, efficient and equitable application of fisheries laws in the day-to-day dealings of fisheries officers with stakeholders and the general community. The policy also provides a clear indication of what our clients will receive from fisheries compliance officers by way of service delivery to:

- Ensure transparency of operations for the regulator
- Maintain public confidence in the agency and the legislation it administers
- Ensure consistency of treatment
- Provide clarity and certainty for the regulated community as well as our staff
- Assist prioritisation and efficient use of resources.

2. Scope

This policy applies to all staff of the Fisheries Compliance Unit (DPI).

3. Definitions

Compliance rate means the state of conformity with fisheries laws. The Fisheries Compliance Unit will secure the optimal compliance rate (as set out in the DPI Corporate Business Plan) through four types of activity:

- Education (includes communication of information in a variety of formats)
- Monitoring (includes auditing, assessing compliance risks, performing quality inspections, conducting overt and covert patrols)
- Gathering and evaluating intelligence and information
- Enforcement activities.

Compliance risk is determined by a methodology used to ensure a consistent and robust system for identifying, analysing, treating, monitoring and reviewing risks to ascertain the potential level of adverse impact that non-compliance with fisheries laws may have on the department's ability to deliver the objects of the Fisheries Management Act 1994 (and other priority areas identified from time to time).

Enforcement activities are designed to respond to non-compliance and include:

- Formal inspections to verify compliance using overt and covert means
- Investigation of suspected breaches of the laws
- Measures to compel compliance without resorting to formal court action; for example, warning letters, directions (e.g. directed works), notices, penalty notices, Ministerial orders and remediation orders – or a combination of these
- Undertaking works and then seeking cost recovery where directed works have not been completed or undertaken subject to a lawful direction
- The use of maximum sanctions as effective deterrents such as seizure of fish, fishing gear, boats, trailers and vehicles
- Withdrawal of access to a fishery resource including forfeiture of shareholdings in a share managed fishery. Loss of licence, permit or authority to engage in certain fishing or aquaculture activities

- Prosecution with a view to conviction in a court of competent jurisdiction where court-imposed penalties may include fines, gaol sentences, forfeiture of assets and goods, prohibition orders, good behaviour bonds, and community service orders.

4. Policy principles

4.1 Purpose of this policy

The primary purpose of enforcement measures is to stop or prevent illegal activities, by making offenders accountable as a deterrent to those involved and to others, thereby promoting the optimal level of compliance.

4.1.1 Promoting voluntary compliance

Promotion of compliance through information and education is the most effective way to secure conformity with the law. Where appropriate, DPI will involve the community and provide opportunities for comment in developing new laws or when amending current laws. The emphasis in administration and enforcement will be on prevention of non-compliance.

4.1.2 Developing strategic alliances

A strategic partnership approach with industries and stakeholders, which encompasses openness and transparency, will be used to improve compliance. The assistance of all sections of the community will be sought in solving compliance problems and reporting suspected offences against fisheries legislation.

4.1.3 Enforcement action is fair, equitable and proportionate

Investigations will be undertaken impartially and enforcement actions will be applied in a manner proportionate with the severity of the breach or regulatory requirements.

4.1.4 Consistency and clarity

Enforcement will be undertaken in a consistent manner using lawful procedures, policies and clear standards. The department will clearly articulate what is expected of those who are required to observe the law. Enforcement will be applied consistently to individuals, companies (including directors, managers and contractors) and local government authorities. Any legal action considered appropriate will comply with guidelines issued by the Attorney General, the Department of Premier and Cabinet or other relevant authority.

4.1.5 Responding to complaints

DPI will endeavour to investigate or respond to complaints relating to potential or suspected offences against the relevant legislation, wherever appropriate, and within the limit of the available resources.

4.1.6 Jurisdiction and responsibility

Responsibility includes the administration and enforcement of the provisions contained in a number of Acts of the NSW and Commonwealth Parliaments, including those Acts which DPI provides enforcement services on behalf of other agencies, such as the Australian Fisheries Management Authority and the Department of the Environment, Water, Heritage and the Arts.

Memoranda of understanding exist to outline practical jurisdictional responsibilities between these agencies in order to effectively implement these working relationships and to enable a cooperative approach to compliance and enforcement.

To enable the accurate and timely exchange of information and services, memoranda of understanding are also used by DPI with other NSW Government departments.

Enforcement issues on the borders between NSW and the states of Queensland, South Australia and Victoria will be addressed through cooperative approaches between the states.

4.1.7 Objectives of the Fisheries Management Act 1994

This policy document is developed pursuant to the objects of the Fisheries Management Act 1994 (FM Act), namely to conserve, develop and share the fishery resources of the State for the benefit of present and future generations.

In particular, the objects of the FM Act include:

- a. *to conserve fish stocks and key fish habitats, and*
- b. *to conserve threatened species, populations and ecological communities of fish and marine vegetation, and*
- c. *to promote ecologically sustainable development, including the conservation of biological diversity, and, consistently with those objects:*
- d. *to promote viable commercial fishing and aquaculture industries, and*
- e. *to promote quality recreational fishing opportunities, and*
- f. *to appropriately share fisheries resources between the users of those resources, and*
- g. *to provide social and economic benefits for the wider community of New South Wales; and,*
- h. *to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the continuation of Aboriginal cultural fishing.*

4.2 Prosecution Policy

4.2.1 Purpose

The purpose of the Prosecution Policy is to:

- Provide consistency in exercising the discretion available in relation to initiating proceedings under the FM Act;
- Provide a framework for considering options other than prosecution;
- Provide a framework for considering other statutory sanctions such as Restoration or Stop Work Orders;
- Provide a classification for offences under the Act to assist in the exercise of discretion for initiating summary and indictable fisheries offences
- Provide procedures for determining whether to proceed by way of indictment for trafficking offences.

4.2.2 Classification of offences

Apart from Section 21B (1) of the Act, all other offence provisions are defined as summary matters pursuant to the *Criminal Procedure Act 1986*.

Section 21B (1) is an indictable offence that may be heard summarily at the election of the prosecutor (being in Table 2 of Schedule 1 of the *Criminal Procedure Act 1986*).

For the purposes of this Prosecution Policy and the Prosecutions Review Committee, offences contained in the Act and Regulations are classified as:

- Level 1 Offences — offences that attract a maximum penalty of less than 200 penalty units
- Level 2 Offences — offences (other than Level 3 and Level 4 offences) that attract a maximum penalty of greater than 200 penalty units or a term of imprisonment
- Level 3 Offences — offences that are contained in Part 7 and 7A of the FM Act
- Level 4 Offences — offences that are indictable. Currently being offences under section 21B (1) of the FM Act (Trafficking of an indictable species).

4.2.3 The decision to prosecute

The discretion to initiate proceedings is wide and largely unfettered. Consistent with the ODPP 'Prosecution Guidelines', the following factors are considered in the decision to approve prosecution or other compliance actions:

- The seriousness or, conversely, the triviality of the alleged offence particularly in relation to the objects of the FM Act
- The environmental harm or impact of the conduct of the alleged offender, having regard to any relevant environmental impact assessment or statements
- Whether or not the alleged offence is of considerable concern to the general public or industry
- The staleness of the alleged offence
- The prevalence of the alleged offence and any need for deterrence, both personal and general
- Whether the alleged offence is of a commercial nature or involves elements of organised crime
- Whether the alleged criminal conduct involves priority species or damage to marine habitats or communities (having regard to any environmental impact assessment and evaluation of habitat damage for Part 7 or 7A matters under the FM Act)
- Whether the species are listed in the Convention on International Trade in Endangered Species (CITES)
- The availability and efficacy of any alternatives to prosecution
- The likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
- Whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive
- The degree of culpability of the alleged offender in connection with the offence, in particular where issues of joint possession of fish or aiding and abetting a fisheries offence arises
- Whether there are any mitigating or aggravating circumstances
- The youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim
- The alleged offender's antecedents and known background
- The expense and resources required to bring proceedings including length of trial
- The necessity to maintain the integrity of the department and community confidence in the department
- In matters involving court election of a penalty notice, the incorrect completion of the penalty notice such as the incorrect date of offence, incorrect infringement code, short title or insufficient evidence.

The applicability of and weight to be given to these and other factors will vary depending on the particular circumstances of each case. A prosecution should not proceed if there is no reasonable prospect of a finding of guilt being secured.

A decision whether or not to proceed must not be influenced by:

- The race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively)
- Personal feelings of the prosecutor concerning the offence, the alleged offender or a victim
- Possible political advantage or disadvantage to the government or any political party, group or individual

- The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct; or possible media or community reactions to the decision.

It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution should always be considered.

Note: The department uses the Prosecutorial Guidelines of the Office of the (NSW) Director of Public Prosecutions for (ODPP) as its model criteria when considering whether or not a prosecution should be commenced or permitted to proceed.

A copy of the ODPP Prosecutorial Guidelines is available online at <http://www.odpp.nsw.gov.au/guidelines/guidelines.html>.

4.2.4 Authority to prosecute

The FM Act does not prescribe who may or may not initiate proceedings. However, indictable offences may only be proceeded under by indictment with the consent of the Director of Public Prosecutions. The procedure for initiation of proceedings of offences under the FM Act is prescribed under the *Criminal Procedure Act 1986*.

Specifically:

- Section 14 — any person may institute a prosecution of proceeding under an Act unless the right is expressly conferred by that Act on a specified person or class of persons
- Section 48 — Commencement of proceedings by police officer or public officer
- Section 8 — Prosecution of indictable offences
- Section 222A — provides for the Minister or Director-General to give effect to the objects of the Act. Section 228 of the Act provides a power of delegation to the Director-General.

Normally summary proceedings will only be initiated by Legal Services Branch officers on behalf of the Director-General after receiving instructions from the Director Fisheries Compliance, or the Manager, Special Operations. In all cases the decision must be consistent with this policy.

An exception to the above can arise if a person is apprehended by a police officer or is subject to action under the FM Act as well as other offences not within the scope of a fisheries officer's normal duties.

The departmental person named as the informant in matters proceeding to prosecution is the Director Fisheries Compliance, Department of Trade and Investment, Regional Infrastructure and Services.

4.2.5 Prosecution review processes

The Prosecution Review Committee (PRC) has been established to review and approve prosecutions and other compliance actions mainly associated with Part 7 and 7A of the FM Act.

The PRC may make the following decisions:

- Approve the Reporting Officers' recommendations
- Approve prosecution and relevant charges or other enforcement actions such as seeking prohibition or restoration orders
- Decline to approve prosecution
- Recommend action other than prosecution
- Return the matter for completion of requisitions on the brief of evidence
- Approve to discontinue a matter, including the 'withdrawal' from proceedings
- Recommend election to have a matter heard on committal for a Level 4 Offence or initiating action for Part 7 or Part 7A matters in the NSW Land and Environment Court

- Refer the matter to the Department of Environment, Water, Heritage and the Arts for prima facie offences against the *Environment Protection and Biodiversity and Conservation Act, 1999* (Cwlth)
- Approve charge negotiation (plea bargaining) for an offence.

Under the guidance of a Compliance Response Matrix, a Prosecutions Review Panel (PRP) reviews Level 2 and 3 offences other than Level 2 offences involving 'the possession or taking of priority species in circumstances of aggravation as defined by the Act'.

The PRP is responsible for reviewing and approving compliance action where:

- Level 2 Summary Offences have been recommended and the conduct of the alleged defendant(s) involves 'the possession or taking of priority species in circumstances of aggravation as defined by the Act'
- All Level 3 offences which subject to a court election following the issuing of a penalty notice.

The Prosecution Review Committee and Prosecutions Review Panel must act objectively and independent of the investigation in carrying out its functions, with all its decisions being recorded.

Where a member has a real or ostensible bias in any matter that comes before the PRC, this must be disclosed at the earliest opportunity and the member should arrange for an alternative person to determine the matter.

4.2.6 Expedition

The ODPP guidelines establish that is a fundamental obligation of a prosecutor to assist in the timely and efficient administration of criminal justice. Accordingly and particularly:

- cases should be prepared for hearing as quickly as possible
- bills of indictment should be found as early as possible, preferably (as normally required) within 28 days of committal for trial
- particulars of the indictment should be communicated to the accused as soon as possible
- any proposed amendment to an indictment should be communicated to the accused forthwith in anticipation of consent or an application for an order giving leave to amend
- any event that affects the question of whether or not a jury will be empanelled must be reported to the Sheriff as soon as practicable

Therefore DPI will normally make the decision to prosecute within 28 days of the investigation being finalised or the matter being referred to the PRP where required (noting that the PRP reviews all Level 2 and 3 matters), except where exceptional circumstances prevail. This requires both the reporting officer to refer the matter to the PRP expeditiously and the PRP to consider the matter without delay.

4.2.7 Review of the evidence

The PRP (or DPI Legal Services Branch where the matter does not require referral to the PRP, or an external legal practitioner instructed by the Director Fisheries Compliance) must evaluate all available material in determining whether or not to proceed with prosecution. Analysis must be undertaken to ensure that admissible evidence supports each element of the offence.

Only if the PRP/legal officer or external legal practitioner instructed by the Director Fisheries Compliance is satisfied that sufficient evidence exists to prove each element of the offence, will consideration be given as to whether to proceed with prosecution. It is not a rule that all offences will be prosecuted. Regard should be given to the following matters:

- Limitation periods
- Existence of any defences or exemptions

- Whether the defendant has been correctly identified, in particular where companies are identified as the defendant
- Careful consideration is given to *mens rea* offences
- Careful consideration is given to 'joint possession' or 'aid and abet' cases and if the cases are severe there must be sufficient evidence to prove the offences set for each alleged offender
- For indictable matters where dishonesty must be proven the evidence demonstrates such a state of mind
- Any defence of honest and reasonable mistake as to fact for strict liability offences
- Whether any of the evidence may be held inadmissible on the basis that it was unlawfully, improperly or unfairly obtained.

The above considerations are not exhaustive and the issues for consideration will depend on the circumstances of each matter.

4.2.8 The choice of offence(s)

It is not uncommon for circumstances to disclose a number of contraventions against the FM Act. Care must be taken to proceed only for those offences when the evidence proves each element of the alleged offence and to properly reflect the conduct of the accused.

In some circumstances, the alleged contravention may trigger more than one offence provision, such as in the case of indictable or commercial quantities of fish. In these matters, duplicity of charges will be avoided and the appropriate charge set after giving consideration to the circumstances of the case.

4.2.9 Discontinuing proceedings

Where further information comes to attention which raises the question of whether the proceedings should be discontinued, the matter will be reviewed and a recommendation provided by Legal Services or an external legal practitioner instructed by the Director Fisheries Compliance.

The prosecutor must act expediently in these cases according to clear instructions from the PRP and the Director Fisheries Compliance.

Any decision to discontinue proceedings must be promptly communicated in writing to the defendant and the decision recorded.

4.2.10 Charge (plea) bargaining or negotiation

In cases involving multiple offences, the defendant may seek to negotiate a plea. It is critical that in all circumstances charges are not withdrawn that reflect the criminal conduct of the accused. Generally, the primary charge or charges will not be withdrawn.

The ODPP guidelines on 'Charge Negotiation and Agreement; Statement of Facts', including the following factors that must be considered in charge negotiation, namely:

- That the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing; and/or
- That the evidence available to support the prosecution case is weak in any material respect; and/or
- That the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial.

DPI also considers the following principles outlined in the ODPP guidelines:

- A charge bargaining proposal should not be initiated by the prosecutor
- The prosecutor must not consider the proposal unless the charges to be proceeded with reflect the whole conduct of the accused; and
- The prosecutor should not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert his or her innocence with respect to charge(s) to which the defendant has offered to plead guilty

- Any charge bargaining the prosecutor should consider seeking consent regarding restoration, prohibition, forfeiture orders, costs or any other appropriate orders
- Whether the accused has consented to restoration, prohibition or other similar statutory orders.

Where NSW Police Prosecutors conduct proceedings, clear written instructions must normally be provided regarding charge negotiation subject to time constraints.

4.2.11 Sentencing

The prosecutor has an active role in sentencing to inform the court of all relevant matters. Guided by an appropriately constructed Statement of Facts, the prosecutor must ensure that the court understands the seriousness and nature of the proceedings and any relevant policy issues.

The prosecutor must advise the court on the range of penalties available including any associated orders being sought (such as forfeiture of motor vehicles or boats, forfeiture of things subject to disputed seizure, moiety, costs etc.).

This Policy adopts Rule 71 of the *NSW Barristers Rules* which provides:

'A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

- Must correct any error made by the opponent in address on sentence
- Must inform the court of any relevant authority or legislation bearing on the appropriate sentence
- Must assist the court to avoid appealable error on the issue of sentence
- May submit that a custodial or non-custodial sentence is appropriate
- May inform the court of an appropriate range of severity of penalty, including a period of imprisonment by reference to the relevant appellate authority.'

4.2.12 Disclosure

Prosecutors have an ongoing obligation to make full disclosure in a timely manner of all material that is relevant to an issue at hand.

Material that raises issues of public immunity, intelligence or the identity of an informer may require the information to be withheld. The prosecutor must obtain written instructions regarding the discloser or otherwise of such material.

Legal professional privilege will ordinarily be claimed against the production of any internal documents such as memoranda between lawyers and operational staff on the investigation or conduct of a matter.

4.2.13 Security of documents and exhibits

All due care must be taken to protect the security of sensitive documents and other material, including information regarding the informant. This includes limiting access to database material, locking material away, recording the movement of documents or other material and restricting access in accordance with the departmental record keeping policy and procedure.

The prosecutor must not discuss the matter with any person not involved in the proceedings or in circumstances where discussions can be overheard. The prosecutor must ensure that all returned exhibits are stored in accordance with policy.

4.2.14 Reasons for decisions

Reasons for decisions in the course of prosecutions may be given by DPI. However, reasons will not be given for matters that attract legal professional privilege or reasons for exercising a prosecutorial discretion to take proceedings.

DPI is also subject to the *Government Information (Public Access) Act 2009* and associated legislation.

4.2.15 Unrepresented accused person

Care must be taken when dealing with accused persons who are not represented. The accused must be properly informed of the procedures so he or she can make informed decisions. The prosecutor, however, must not give legal advice. A record should be made of all discussions with an unrepresented defendant. The prosecutor must endeavour to inform the court of any matters that will assist the court in directing the accused.

4.2.16 Indictable procedure

Where a decision is made to proceed with an indictable offence, the matter may proceed summarily.

In the most serious of indictable matters the ODPP may be requested by the Director Fisheries Compliance to initiate and conduct the matter in circumstances where the matter is not initiated summarily in the Local Court of NSW. The matter will only be initiated in consultation between the Director Fisheries Compliance and the ODPP.

The ODPP does not have an investigation role. Matters prosecuted by ODPP are subject to its discretion in accordance with ODPP guidelines.

4.3 Aquaculture Compliance Work Instructions

Where compliance responses are under consideration for offences relating to the oyster or aquaculture industries the responses will be commensurate with the objectives set out in the DPI Aquaculture Compliance Work Instructions which has links to the NSW Oyster Industry Sustainable Aquaculture Strategy (OISAS), a NSW State planning instrument.

From time to time joint operations between NSW DPI, NSW Police and the NSW Food Authority may be engaged to address offences relating to or affecting the post-harvest and aquaculture industries, such as Operation Trident — designed to reduce oyster theft and illegal sales.

From time to time local management plans may be developed between the Aquaculture Management Unit and the Fisheries Compliance Unit to address any localised compliance issue.

4.4 Aboriginal Fishing Interim Compliance Policy

PLEASE NOTE:

An interim compliance policy was agreed between DPI and the NSW Aboriginal Land Council and Native Title Services Corporation; it came into effect on 22 January 2010.

The policy has since been amended based on further consultation with the Aboriginal Fishing Advisory Council with those amendments coming into effect on 22 December 2011. It has been distributed to Fisheries Officer's on the basis that the circumstances and scenarios listed below are recognised as lawful Aboriginal cultural fishing activities.

Please ensure you read the policy in its entirety before proceeding and if you have any queries please contact DPI, Cronulla on (02) 9527 8411.

The *current* Aboriginal Fishing Interim Compliance Policy

- For the purpose of providing for cultural needs where elders, the incapacitated, or other community members are not able to or it is otherwise not appropriate for them to engage in Aboriginal cultural fishing the individual limit of fish that may be taken and/or possessed has been increased to double that of the current recreational bag / possession limits (other than for abalone) applicable to the individual who is actually fishing.
- For the purpose of providing for cultural needs where elders, the incapacitated, or other community members are not able to or it is otherwise not appropriate for them

abalone that may

be taken and/or possessed is 10.

- If you wish to exceed these amended daily bag and possession limits for a larger cultural event, permits are available under section 37 of the *Fisheries Management Act 1994*. The section 37 permits provide defences against some aspects of the fisheries laws but only if the permit conditions are complied with.
- To complement this, the shucking of abalone, rock lobster and turban shell is permitted within 100 metres of the high water mark but **only if the fish are consumed in this area**.

It is also important to note -

- These rules also apply in the appropriate zones of marine parks.
- All other fishing activity and possession of fish and/or fishing gear must comply with the current fisheries legislation.

4.5 Marine Parks Compliance Policy

The interim Marine Parks Compliance Policy applies until further notice.

<http://www.mpa.nsw.gov.au/pdf/Marine-Parks-Compliance-Policy-INTERIM-2008.pdf>



Fisheries Compliance Enforcement Procedure

1. Introduction

The aim of the Fisheries Compliance Unit is to achieve an optimal level of compliance with the State's fisheries laws as they relate to the objects of the *Fisheries Management Act 1994* (FM Act) to 'conserve, develop and share the fishery resources of the State for the benefit of present and future generations'.

The compliance model upon which this Enforcement Procedure is based, draws from the Australian Fisheries National Compliance Strategy (ANFCS) 2010/2015, which defines the 'optimal level of compliance' as:

'That which holds the level of non-compliance at an acceptable level, which can be maintained at a reasonable cost for compliance/enforcement services, while not compromising the integrity and sustainability of the resource.'

This procedure should be read in conjunction with the Fisheries Compliance Enforcement Policy. Together, they provide the guiding principles necessary for a fair, safe and equitable application of the law in the day-to-day dealings of authorised DPI personnel with the general public and others. These documents also form a clear indication of what the public can expect to receive from compliance officers by way of service delivery.

2. Measures to maximise voluntary compliance

DPI supports the ideal that programs promoting voluntary compliance are an effective tool in securing conformity with the law. Components of extension programs include awareness and information campaigns, education programs and transitional programs conducted prior to implementing compliance and enforcement activities for new fisheries laws. Wherever possible, DPI will work in partnership with industry, peak bodies and stakeholder groups to gain support for, and achieve compliance with fisheries laws.

Departmental officers will encourage the voluntary adoption of the desired practices using a combination of activities such as:

- Interacting formally and informally with relevant industries and representative groups
- Providing direct advice to clients
- Making presentations to various stakeholder and community groups including schools
- Producing or contributing to the development of guidelines, codes of practice and policies and (where appropriate) distributing these to appropriate groups
- Providing and presenting educational and advisory materials
- Providing website information (including this document)
- Encouraging community, industry and stakeholder engagement to promote safe and sustainable practices in relation to resource allocation and use
- Promoting stewardship, partnerships and planning
- Promoting desired behaviours and reporting on compliance outcomes through electronic and print media in a manner that reinforces key messages
- Executing strategic and operational plans that anticipate illegal activity and take active measures to prevent it and replace it with voluntarily compliant behaviour.

3. Monitoring compliance

DPI monitors compliance and detects contraventions of legislation by strategically analysing information from its own staff, informants, the general public, non-government organisations and other government agencies. Monitoring may take place through:

- Regular and random formal inspections
- Auditing including 'Quality Inspections' (to ensure consistent inspection standards)
- Auditing services to assess compliance
- Reviewing and monitoring information provided by the public or affected individuals
- Analysing organisational information (compliance statistics)
- Reviewing mandatory reporting of information by licence/permit holders
- Tactical patrols, targeted investigations and compliance operations
- Analysis of information reported to the 'Fishers Watch' reporting service and via other sources including reporting functions established by conditions of licences/permits/fishing authorities.

These activities recognise the importance given by the general public to monitoring compliance and by gauging the effectiveness and awareness of education campaigns.

Where possible, strategic partnerships with other agencies are developed to maximise cooperation where monitoring responsibilities overlap. The department also works closely with agencies with specific expertise in law enforcement or other relevant areas.

3.1 Investigation

Fisheries Compliance Units investigate reported or detected contraventions. This is undertaken by a preliminary investigation, analysis and examination of relevant and available facts and likely impacts. This will enable a decision on the likelihood that a contravention has occurred or is about to occur, its seriousness or likely consequences. Based on the outcome of this initial investigation and the relevant provisions of the legislation, a compliance manager determines the appropriate level, if any, of further investigation and response.

Where the officer undertakes an investigation, it will be to the level where sufficient information is collected to determine whether or not there is a case to answer (the prima facie test).

The investigation includes consideration of compliance history, availability of departmental resources, the imminent risk to the integrity and sustainability of the resource, concerns of legitimate user groups and other factors. Compliance with new legislation may also become an inspection and investigation priority.

The department's inspections and investigations aim to:

- Determine whether or not there has been a contravention of the law
- Gather evidence that would be admissible in a prosecution, or administrative or civil or tribunal proceedings
- Satisfactorily prove or disprove allegations or achieve acceptable conclusions
- Deal appropriately with persons of interest
- Improve controls for prevention of contraventions
- Deter suspects or others from further or similar actions
- Maintain and improve public confidence in the integrity of the department
- Be completed within a reasonable time and at reasonable costs according to legislative requirements and the nature of the investigation.

4. Compliance responses to illegal activity

DPI will employ a range of risk-managed responses that can escalate according to the level of non-compliance and severity of the contravention.

Education and warnings, including directions and notices (prior to the use of higher sanctions) are used in response to minor or less serious contraventions. This is to promote a change of behaviour of persons not familiar with new and existing legislative requirements.

For serious or continuing contraventions, deterrent sanctions are used that may include suspension or cancellation of permits or licences (administrative compliance), court orders, penalty infringements and prosecution action including indictable offences.

Responses to alleged breaches will be prioritised using a risk management approach so the compliance response (or enforcement action) is proportionate to the level of harm (impact) posed by non-compliance or other risk factors.

In determining compliance response priorities the following factors will be considered:

- The gravity of the alleged offence
- The likelihood that the intervention will prevent further breaches
- The resources required to engage the compliance action
- The likelihood of obtaining a conviction

4.1 Criteria for determining appropriate responses

In determining appropriate responses to suspected contraventions, consideration is given to factors generating 'impact' such as:

- The objectives and purposes of the relevant legislation and the penalty provisions
- The seriousness of the harm caused by the alleged contravention to the integrity and sustainability of the resource, legitimate user groups, the department and its people
- The level of malice or culpability (for example, was the contravention unintentional, opportunistic or intentional?)
- Whether or not the suspect has a history of prior contraventions
- Whether or not the suspect obstructed or otherwise impeded authorities when the contravention was detected
- The cost to the NSW Government or general community of the contravention
- The potential commercial value of the contravention to the suspect
- The likelihood of the contravention continuing or being repeated
- The prevalence of the type of contravention
- The likely public perception of the contravention and the manner with which it is dealt
- The deterrent effect

DPI will consider the following in determining the appropriate responses depending on the legislation involved and the level of impact or potential impact:

- Advisory periods (periods where no action is taken while fishers adjust to new rules/specifications)
- Warnings (e.g. written cautions)
- Directions (e.g. stop work command, work plans relating to aquaculture)
- Notices (written instruction to comply)
- Orders (Ministerial orders, stop work orders, instructions to perform remedial action issued by a senior executive of the department or a court or law)
- Penalty Notices (on-the-spot fines)
- Prosecutions (leading to criminal conviction, financial penalties, forfeiture of assets and/or imprisonment)
- Search warrant entry to secure evidence (exercising powers of search and seizure)
- Seizures of fish, fishing gear, vehicles, boats and trailers and other things associated with a fisheries offence
- Seeking court orders relating to the forfeiture and disposal of things seized

- Invoking the provisions of the *Confiscation of Proceeds of Crime Act 1989*
- Exercising powers of arrest (e.g. where a person is found committing an offence or who threatens, abuses or assaults a fisheries officer).

To assist the department in developing appropriate responses to risk based analyses of fisheries compliance the Risk Based Compliance model (issued by the Office of the Premier and Cabinet) is used in fisheries compliance planning models.

4.2 Habitat Assessment Guidelines

Where the alleged offence relates to habitat destruction and conservation values under Part 7 of the FM Act (Habitat Protection), a system of grading the offence with regard to its potential ecological value will be made using assessment guidelines developed for specifically calculating damage to habitat and ecological communities (DPI Habitat Assessment Guidelines).

4.3 Prosecution Review Committee

Matters warranting a response involving legal sanctions and/or orders are referred to the Prosecution Review Committee (PRC) along with at least one expert witness statement outlining the extent of the impacts of the breach and providing guidance on any appropriate remedial action. The PRC is made up of senior legal and compliance managers who evaluate the available compliance responses and recommend a course of action (e.g. legal and remedial measures) with a view to achieving the most appropriate outcome.

4.4 Penalties

The FM Act establishes penalties for all offences including those for which a penalty notice is available. In the case of prosecution, the courts determine the actual fines; however, the following points outline the major penalty provisions of the FM Act:

- Penalty notices up to \$5,500
- A maximum penalty of \$22,000 or two years imprisonment or both applies for harming a threatened species
- A maximum penalty of \$110,000 for illegal fishing applies in a Recreational Fishing Haven
- Proceeding by way of indictment in the most serious of offences under advice from the Office of the Director of Public Prosecutions with up to 10 years imprisonment
- Fish taken, possessed or sold (as the case may be) in circumstances of aggravation are subject to higher penalties. Circumstances of aggravation means fish are a priority species of fish and the quantity of that species is a commercial quantity as prescribed in Schedule 1B of the FM Act
- Additional monetary penalty for bag limit offences involving priority species means the court may impose an additional penalty for section 17 or section 18 offences of up to 10 times the market value of the fish subject of the offence
- Higher penalties for second and subsequent offences. If a person is convicted of a particular offence committed and has previously been convicted of that offence then the second or subsequent conviction attracts higher maximum penalties
- Penalties for 'Trafficking in fish' where an indictable quantity of a species of fish are involved. Indictable quantity of a species of fish means the quantity specified as an indictable quantity of fish for the species concerned in Column 3 of Schedule 1C of the FM Act
- Duty of master of boat to prevent contravention of Act – in certain circumstances a master of a boat commits an offence if another person on board the boat commits a serious fisheries offence (as defined) while the boat is being used for fishing activities
- Serious fisheries offences – in addition to the above where they apply, certain offences are 'serious fisheries offences' for purposes of restoration orders and other actions and orders made by the Minister or the Court

- In addition to imposing a penalty, a court may order that action be taken to prevent the continuance or recurrence of the offence
- A court may forfeit to the Crown any thing seized in connection with a fisheries offence (including vehicles, boats, fishing gear, diving gear and fish up to \$60,000 value in the Local Court).

4.4.1 Penalty notices

The FM Act establishes specific offences for which a penalty notice may be issued. A penalty notice imposes a fine, the maximum level of which is also set in the FM Act. Offences for which penalty notices may be applied are of a well-defined nature and usually, depending on the circumstances, present a low to moderate level of adverse impact.

Examples of penalty notices used are:

- Section 14(1) Take fish in contravention of a fishing closure (\$500)
- Section 16(1) Possess prohibited size fish (\$500)
- Section 18(2) Possess more than maximum quantity of fish (\$500)
- Section 20(3)b Take fish from declared waters (\$5,500)
- Section 24(1) Unlawfully use net or trap for taking fish (\$500)
- Section 25(1)(a) Possess fishing gear — when prohibited (\$500)
- Section 34J(1) Recreational fisher fails to pay fishing fee (\$200)
- Section 34J(2) Fail to have official fishing fee receipt in possession (\$75)
- Section 35(1) Possess fish illegally taken (\$500)
- Clause 45(1) Fail to mark set fishing gear (\$100)
- Clause 54(1) Fail to mark boundaries of aquaculture lease (\$300).

Note: A combination of penalty notices, written cautions and other measures may be used.

4.4.2 When will penalty notices not be used?

Penalty notices will be generally issued for all offences for which they are available except:

- Where consistent with guidelines pursuant to the *Fines Act 1996* by the Attorney General, a warning (caution) is appropriate. A repeated offence or offence where no reasonable steps were taken to remedy the situation will, however, in most cases attract a penalty notice
- Where in accordance with this policy, a prosecution is appropriate
- Where an offence leads to an additional offence for which a penalty notice is not available.

4.4.3 Alternative penalties

A range of options are available to the department for instances of non-compliance which may be used to complement other enforcement action or act as alternative penalties. These can include Ministerial orders (without conviction) court orders, directions, and cancellation of a fishing authority, endorsement, licence or permit.

For example, if dredging or reclamation work is carried out in contravention of section 200 or 201 of the FM Act, the Minister may, by order in writing given to the person (or other legal entity) concerned, require that person to carry out, within a period specified in the order, such remedial work as the Minister considers necessary to rectify the damage caused to fisheries and fish habitats by the dredging or reclamation work.

A court that convicts a person of an offence against sections 200 or 201 may also make an order of the kind above.

If the requirements of an order are not complied with within the period specified, the Minister may cause the work to be carried out, and may, by proceedings brought in a court of competent jurisdiction, recover as a debt from whom the order was given the cost of complying with those requirements.

The Minister may also order restoration work to be carried out in relation to illegal operations on an aquaculture farm (or permit area) requiring the person to remove any structures or carry out other remedial works. If a person fails to comply with an order, the Minister may cause the work specified in the order to be carried out, and may, by proceedings brought in a court of competent jurisdiction, recover from the person as a debt the cost of carrying out the work.

The Minister may give an order whether or not any person has been charged with or convicted of an offence in respect of the matter.

The Minister may suspend or cancel an endorsement of a nominated/endorsed commercial fisher if the fisher does anything that would be grounds for cancellation or suspension of the fisher's commercial fishing licence, or the Minister is satisfied that the fisher has contravened a provision of a plan relating to the management of a share managed fishery, or the fisher is convicted of an offence relating to a share management fishery or a serious offence in another fishery.

Further examples of alternative penalties may be found by reviewing the FM Act. To view the FM Act, go to the official NSW Government website for online publication of legislation, the NSW Parliamentary Counsel's Office: <http://www.legislation.nsw.gov.au>.

4.4.4 Costs

If a court finds an individual, company or local government agency guilty of an offence, NSW DPI may apply for:

- Professional costs incurred in preparation and presentation of the case
- Reimbursement of all reasonable expenses including analytical and witness costs
- Other costs associated with the offence
- Where the activity results in damage to Crown property or loss of revenue or costs to the department, DPI may consider recovery of damages through any applicable criminal proceedings or civil litigation even in cases where there have been no other legal proceedings. Where appropriate, impact statements may be used as part of this process.

4.5 Training

DPI provides appropriate law enforcement training to all employees who are required to perform the duties and functions of authorised persons. Training programs provide staff with the necessary competencies to promote and compel compliance in a consistent and lawful manner; they also provide the necessary skills to effectively deal with the public in a professional, safe and ethical manner.

Some fisheries officers are trained in court proceedings enabling them to present matters to a magistrate's court for 'mention'. Where a 'not guilty' plea is entered at a mention, NSW DPI will engage satisfactory legal counsel to prosecute the matter (i.e. NSW Police Prosecutor, Crown Solicitor or a privately practising legal practitioner).

4.6 Privacy and personal information

Obtaining reliable information from the public relating to alleged contraventions assists DPI with enforcement. Information can be provided through the Fishers Watch phone line (1800 043 536), by online reporting (<http://www.dpi.nsw.gov.au/fisheries/compliance/report-illegal-activity>) and through other discreet arrangements. Information and intelligence obtained is handled and used in accordance with lawful procedures to detect and prevent illegal activity. Information received by informants will be handled in accordance with the department's privacy policy to appropriately manage secure storage, confidentiality and anonymity.

DPI is committed to valuing and protecting personal and sensitive information collected in the course of performing its functions in respect of how we collect, use, disclose and manage personal information.

DPI's commitment to the protection of personal information is balanced with meeting our obligations under privacy legislation (and the principles of personal information management) while delivering transparent decision-making, influencing the behaviours of people whose actions may have an adverse impact on fisheries stocks and conservation values - and providing reliable and relevant information to partner agencies.

Legislation generally allows for personal information to be collected, used, disclosed and handled enabling the department to undertake its enforcement functions. DPI may also be lawfully required to collect, use, disclose or handle information in order to meet its obligations under other legislation. Where required by law, personal information may also be shared with other departments or agencies. DPI is subject to provisions of the *Government Information (Public Access) Act 2009*.

For more information on privacy matters contact the Office of the NSW Privacy Commissioner <http://www.lawlink.nsw.gov.au/privacynsw>

4.7 Publication of offences and the media

DPI will use a mix of appropriate media to convey timely advice and information to increase voluntary compliance and desired behaviours.

DPI will publish details of significant detections, apprehensions and court results to maximise the deterrent effect and to reinforce key messages about sustainability and responsible fishing.

4.8 Compliance planning

To use compliance resources as effectively and strategically as possible the Fisheries Compliance Units work from a Statewide Compliance Plan that sets out the overall direction and methodology for fisheries compliance planning in NSW. This in turn supports the objectives of higher planning instruments (e.g. the NSW State Plan and DPI Corporate Plan) and complements nationally accepted fisheries compliance methodology.

Annual District Compliance Plans (ADCPs) are developed in consultation with compliance management to set compliance targets and to program planning priorities at a zone/district level. Fisheries compliance risks are identified, analysed and evaluated in a District Profile relevant to each district which highlights local compliance risks, 'hot spots' and compliance trends particular to the area. The ADCPs are then used to address the risks in order of priority and are adaptable as new or revised risks are identified.

4.9 Continuous improvement

DPI is committed to continual improvement in its delivery of enforcement-related services. The department achieves this improvement through review and amendment procedures such as:

- Periodically reviewing the department's management of enforcement action and prosecutions
- Reporting any significant findings and recommendations to the Executive
- Engaging consultants to provide advice on developing more effective and efficient systems
- Reviewing planned work schedules to ensure the appropriate level of enforcement activities are being allocated to appropriate risk areas
- Maintaining membership in national compliance expert groups (e.g. National Fisheries Compliance Committee and Australian Fisheries Management Forum) and hosting or attending and making presentations to the annual Australasian Fisheries Law Enforcement Conference
- Adopting new and proven methodologies in compliance management utilised by national and international agencies
- Using and developing new technologies and systems to improve compliance and the quality of evidence
- Maintaining close links with partner agencies

- Seeking advice and guidance on prosecution management from the Crown Solicitor's Office
- Developing strategies to address and support changes in Government direction.

5. Safety

Under the powers conferred by State and Commonwealth legislation, fisheries officers reserve the right to board and search any vessel within the waters of the jurisdictions for which the officers are authorised. Authorised officers are extended the power to stop and search any vehicle and have the power of 'arrest without warrant' where a person is found committing, or believed to have committed, a fisheries offence.

The department is committed to the safety of its employees and clients during all interactions (e.g. boarding of vessels, exercising of powers of search, seizure and arrest). The department does this by:

- Recruiting staff with the appropriate skills and disposition to undertake law enforcement work in a fisheries-related environment
- Conducting comprehensive occupational health and safety risk assessments and undertaking measures and providing officer-safety controls to reduce risks with a view to zero harm
- Providing high-quality standard operating equipment (e.g. customised patrol vessels, vehicles and specialist/safety equipment) and maintaining these to appropriate standards
- Using standard operating procedures and safe work method statements to guide and protect officers undertaking risky activities
- Providing comprehensive on-the-job training including the use of fisheries patrol vessels and vehicles in a compliance environment, dealing with aggressive clients, the use of tactical procedures and provision of and training in classified appointments (e.g. defensive weapons and accoutrements).

Officers will use their training and skills to ensure that they do not risk their own safety or the safety of others when performing compliance functions.

6. Conclusion

This policy and procedures has no legal status and is not legally binding on DPI. The policy cannot be used to limit the discretion of the agency to take any enforcement action.

The policy is only to be interpreted as general guidance on how DPI will undertake enforcement action.

Date effective: 29 July 2011

Enforcement Procedure Related Documents

- Australian Fisheries National Compliance Strategy 2010-2015
- Statewide Fisheries Compliance Plan
- Aquaculture Oyster Compliance Work Instructions*
- Fisheries Compliance Operational Policy and Procedures*
- Habitat Assessment Guidelines*

*Denotes DPI internal work instructions.

7. References and bibliography

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